

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 3585 OF 2004
IN
SUIT NO. 3529 OF 2004**

M/s. Bharat Warehousing Company.] .. Plaintiff
Versus
M/s. Sunny Construction Company.] .. Defendants

ALONGWITH

**NOTICE OF MOTION NO.1178 OF 2005
IN
SUIT NO. 3529 OF 2004**

M/s. Bharat Warehousing Company.] .. Plaintiff
Versus
M/s. Sunny Construction Company.] .. Defendants
And
Pramod Arvind Lele.] .. Applicant

WITH

**NOTICE OF MOTION NO. 1297 OF 2005
IN
SUIT NO. 3529 OF 2004**

M/s. Bharat Warehousing Company.] .. Plaintiff
Versus
M/s. Sunny Construction Company.] .. Defendants
And
Mrs. Smita Suhas Daphare & Anr.] .. Applicants

WITH

**NOTICE OF MOTION NO. 1307 OF 2005
IN
SUIT NO. 3529 OF 2004**

M/s. Bharat Warehousing Company.] .. Plaintiff
Versus
M/s. Sunny Construction Company.] .. Defendants
And
Govind Singh Kenyal & Anr.] .. Applicants

AND

**NOTICE OF MOTION NO. 1336 OF 2005
IN
SUIT NO. 3529 OF 2004**

M/s. Bharat Warehousing Company.	]	.. Plaintiff
Versus		
M/s. Sunny Construction Company.	]	.. Defendants
And		
Ajit D. Karnataki & Anr.	]	.. Applicants

Mr. Shailesh Shah with Ms. Mrudul Bhatia with Lalit Jain for the plaintiffs in all Suits and for the applicants in Notice of Motion No. 3585 of 2004.

Mr. Niranjan Jagtap for the applicants in Notice of Motion No. 1297 of 2005.

Mrs. Anita Borkar for the applicants in Notice of Motion No. 1307 of 2005.

Mr. Dushyant Purekar for the applicants in Notice of Motion No. 1336 of 2005.

Mr. Neel H. Helekar with Ms. Anjali Helekar for the applicants in Notice of Motion No. 1178 of 2005.

Mr. Prakash G. Lad for the defendants in all the Suits.

CORAM: ANOOP V. MOHTA, J.

DATED: 18TH MARCH, 2006

P.C. :

. In a suit for specific performance of a contract based on agreement dated 12th June, 1986, and supplementary agreement dated 3rd January, 1989, the plaintiffs have prayed for appointment of Receiver and further prayed for order of injunction against the

defendants in Notice of Motion No.3585 of 2004.

2. On 4th March, 2005, after hearing both the parties, following ad-interim order was passed:

"The Court receiver is appointed as an interim receiver in respect of the suit flats. The receiver however shall not dispossess the present flat purchasers of the property subject to the condition that the said flat purchasers execute an agency agreement with the receiver within a period of four weeks of payment. It is clarified that the flat purchasers would not require to furnish any security nor pay any royalty to the Court receiver. Since the order is passed without notice to the flat purchasers they would have a liberty to apply, if they feel aggrieved, after 48 hours written notice to the plaintiff."

3. The properties in question are four flats having Nos.401, 402, 403 and 404 on the fourth floor in the building called "Prathamesh Cooperative Housing Society" Wing B. The said society is not made a party. The defendants are the buildings who entered into development agreements with the plaintiffs. As contended, the defendants committed defaults in payment of the consideration. Therefore, the present suit dated 1st December, 2004.

4. The defendants have not challenged the aforesaid ad-interim order. However, the respective

applicants in Notices of Motion No.1307 of 2005 [Flat No.404 - dated 3rd January, 2003]; No. 1297 of 2005 [Flat No.403 - dated 2nd February, 2003; No. 1178 of 2005 [Flat No.401 - dated 3rd September, 2003 and No.1336 of 2005 [Flat No.402 - dated 11th May, 2004] have preferred the Notices of Motion for vacation of the ad-interim order dated 4th March, 2005 in Notice of Motion No. 3585 of 2004 and also prayed for stay of the said order. The applicant in Notice of Motion No.1307 of 2005 has purchased the flat No.404 by registered Deed on 3rd January, 2003. The applicant in Notice of Motion No.1297 of 2005 has purchased the flat No.403 by registered Deed on 2nd February, 2003. The applicant in Notice of Motion No. 1178 of 2005 has purchased flat No.401 on 3rd September, 2005 and the applicant in Notice of Motion No. 1336 has purchased the flat No.402 on 11th May, 2004. They are in possession of the said respective flats since then. Therefore, on the date of filing of the suit i.e. 1st December, 2004, all these applicants are in exclusive possession of the respective four flats in question. Therefore, these Notices of Motion by the respective applicants.

5. The suit for specific performance in question is based on two Agreements as referred above. The relief in such suit of specific performance is always

discretionary. While granting the final relief in such suits of specific performance, Court needs to take into consideration the various factors, including delay, latches, readiness and willingness of the parties, default, the essence of time and possibility of granting the discretionary relief as prayed. In the present case, admittedly when the ad-interim order dated 4th March, 2005, was passed, liberty has been granted to the flat purchasers to apply, after giving 48 hours notice to the plaintiffs. There was clear suppression of facts that the flats have already been sold and are in possession of such flat purchasers. In these Notices of Motion, during the hearing of these Notices of Motion, time was extended to execute the agency agreement with the receiver. However, till the final hearing of the present Notice of Motions, no such agency agreement was executed by the applicants with the Receiver. As consented and agreed by the parties, all these Motions are being heard together and, therefore, the present common order.

6. The defendants, admittedly, have not accepted the case of the plaintiffs of default in payment as agreed. On the contrary, the counsel for the defendants, by referring to Exhibits IV and V annexed to the Affidavit in reply dated 21st December, 2004,

basically contended that the full consideration has been paid to the plaintiffs including cash of Rs.20 lakhs. He further contended, based on the further Affidavit dated 15th December, 2004, that the plaintiff in fact had acknowledged by letter dated 14th November, 2002, to have received a full and final payment towards the payment of consideration for the development of the property bearing CTS No.16, Matunga Division, Naigaum, Mumbai. Therefore, as on 14th November, 2002, the defendants had paid full consideration and there was nothing due and payable. The learned counsel appearing for the plaintiffs have not disputed the said receipt, as well as, the receipt of the amount referred above. However, he contended that these receipts were only towards the monetary consideration as per the agreement. The rights over the said four flats are still with the plaintiffs. The defendants, therefore, had no right to transfer the said flats to third persons. These disputed questions of fact, according to me, cannot be decided at this stage of the proceedings, specially in the suit for specific performance in question. The whole case of specific performance, therefore, needs to be decided after leading evidence in respect of the rival contentions. In view of this, it is difficult to accept the case of the plaintiffs to continue the ad-interim order dated 4th March, 2005 passed in the

present case. In view of the above admitted position as before the filing of the present suit itself, the properties in question have been transferred and the applicants-flat purchasers are in exclusive possession of the suit property since then, I see no reason to continue the said ad-interim order of appointment of Receiver as passed in the present case. The ingredients, as contemplated under Order XL Rule 1 are missing in the present facts and circumstances of the case. There is no *prima facie* right which is in favour of the plaintiffs to be sufficient to grant such order of appointment of Receiver or injunction, as prayed.

7. The plaintiffs further failed to demonstrate and/or place material on the record to justify his inaction since 10th April, 2002, till the date of filing of the suit. Except for Notice dated 10th April, 2002, no further steps had been taken by the plaintiffs to claim their rights based on the agreement for development dated 12th June, 1986 and supplementary agreement dated 3rd January, 1989. The supplementary agreement dated 3rd January, 1989 was not registered. It is, therefore, just a letter exchanged between the parties. Therefore, basic claim revolves around the registered agreement dated 12th June, 1986. If the full and final payment was received by the plaintiffs, as

contended by the defendants based on the receipt dated 14th November, 2002, unless proved otherwise, there was no hurdle for the defendants to transfer or create third party interest in the flats in question. The Notice dated 10th April, 2002, issued by the plaintiffs itself mentioned about the termination of the said development agreement. In the Plaint, there is no justification with material on record to support what steps or what action the plaintiffs have taken to claim their rights based on the agreement of 1986. In the suit for specific performance and in the facts and circumstances of the case, the delay and laches on the part of the plaintiffs definitely disentitles them to claim any interim relief and specifically of the appointment of Receiver as prayed in the present matter.

8. The applicants, therefore, are bonafide purchasers of the suit flats as on the date of the respective registered agreements, there was nothing to debar the defendants from transferring the said flats to the applicants. The case of the plaintiffs that the defendants were fully aware of the balance consideration of the agreement dated 12th June, 1986, as referred in the unregistered supplementary agreement dated 3rd January, 1989, that itself also cannot help the plaintiffs to affect the rights of the flat purchasers

at this stage. The applicants, who purchased the flats after due verification of the property in question by obtaining loans from the Banks, cannot be said to have knowledge about the said agreement to their detriment.

9. There are various other disputed questions of facts raised by the parties which, according to me, cannot be gone into at this stage of the proceedings. The order dated 4th March, 2005, in the facts and circumstances of the case, cannot be continued against the applicants and/or defendants.

10. However, to avoid further complication in the matter, I am of the view that the applicants in Notices of Motion Nos. 1307 of 2005, 1297 of 2005, 1178 of 2005 and No.1336 of 2005 should not create any third party right or interest or transfer or alienate the respective flats pending the hearing of the suit.

11. The other reliefs, as claimed by the plaintiffs in their Notice of Motion of claiming damages to the tune of Rs.90,000/- from the defendants cannot be granted at this stage. In view of the above, there is no question of appointing any Receiver and/or any injunction, as prayed in terms of prayer clauses (a) and (b) as defendants have already transferred the said

property in favour of the applicants-flat purchasers. The further prayer of directing the defendants to pay the respective land revenue dues is also in dispute and, therefore, at this stage, no such relief can be granted to the plaintiffs, as prayed.

12. The respective applicants-flat purchasers in Notices of Motion Nos. 1307 of 2005, 1297 of 2005, 1178 of 2005 and 1336 of 2005 are hereby restrained from transferring, selling or alienating or encumbering or creating any third party rights in the said flat Nos.401, 402, 403 and 404 in B Wing of Prathamesh Cooperative Housing Society situated at Naigaum Cross Road, Dadar, as described in Exhibit-A of the Plaint.

13. In view of this, Notice of Motion No.3585 of 2004 is partly allowed, as above. The order dated 4th March, 2005, is vacated.

14. Notices of Motion Nos. 1307 of 2005, 1297 of 2005, 1178 of 2005 and 1336 of 2005 partly allowed in terms of prayer clause (a).

15. All the above Notices of Motion are accordingly disposed of. No order as to costs.

Sd/-
[ANOOPI V. MOHTA, J.]